Supreme Court, U.S.
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No. 94-689

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

DUNCAN ENERGY COMPANY, NBB OIL & GAS PARTNERS (U.S.A.), AMERADA HESS CORPORATION, TYREX OIL COMPANY AND TURTLE MOUNTAIN GAS & OIL, INC.,
Petitioners,

v.

THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION; THREE AFFILIATED TRIBES TRIBAL BUSINESS COUNCIL; THREE AFFILIATED TRIBES TAX COMMISSION; WILBUR D. WILKINSON, CHAIRMAN, TRIBAL BUSINESS COUNCIL; JOSEPH J. WALKER, TAX COMMISSIONER; AND MARCUS WELLS, JR., DIRECTOR, TRIBAL EMPLOYMENT RIGHTS OFFICE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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MEMORANDUM OPPOSING CERTIORARI

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Petitioners ("Oil Companies") brought this action against respondent Three Affiliated Tribes of the Fort Berthold Reservation and agencies and officers thereof ("Tribe") challenging tribal tax and employment ordinances applicable to their activities on lands owned by non-Indians in fee ("fee lands") within the Tribe's reservation. The Eighth Circuit Court of Appeals held that *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), and *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985), required the Oil Companies to exhaust tribal remedies before bringing suit in federal court, and ordered the case dismissed without prejudice or stayed pending the exhaustion of tribal remedies. Pet. App. 10a-13a. Earlier this term the Court denied certiorari in a case involving substantially the same issues. *Middlemist v. Babbit*, No. 94-42, 63 U.S.L.W. 3346 (U.S. Oct. 31, 1994). *See* Pet. at 10-11, noting similarity to *Middlemist*. Petitioners in *Middlemist*, like petitioners

here, were non-Indians who sued tribal agencies and officials challenging the Tribe's assertion of regulatory jurisdiction over their activities on fee lands within the reservation. The Ninth Circuit in *Middlemist* affirmed the dismissal of the case without prejudice for failure to exhaust tribal remedies, relying on *Iowa Mutual* and *National Farmers Union*. *Middlemist v. Babbit*, 19 F.3d 1318 (9th Cir. 1994), *aff'g* 824 F.Supp. 940, 944 (D.Mont. 1993).

1. The first question presented in this case—whether exhaustion of tribal remedies is required in the absence of ongoing tribal proceedings—is the same as the first question presented in *Middlemist*. *See* Petition for Writ of Certiorari, *Middlemist* at i, No. 94-42 ("*Middlemist* Pet."). As shown in the Brief for the Federal Respondents in Opposition in *Middlemist* ("U.S. *Middlemist* Br.") (at 6-10), there is no conflict between the circuits on this issue, and requiring exhaustion in the absence of ongoing tribal proceedings is fully consistent with this Court's precedents, including *Iowa Mutual* and *National Farmers Union*, cited above.

2.a. The second question presented by petitioners here appears to encompass two separate but related questions: (1) whether exhaustion of tribal remedies is required where the non-Indian conduct regulated by the tribe occurs on fee lands and the tribe asserts that "that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," *Montana v. United States*, 450 U.S. 544, 566 (1981) (the so-called "second *Montana* exception"), and (2) "in the face of Congressional abrogation of tribal sovereign power, can a tribe possess civil regulatory jurisdiction over non-member activity" on fee lands. These questions were also encompassed in the second issue presented in the petition which was denied in *Middlemist*, *see Middlemist* Pet. at i, as acknowledged by the Oil Companies. Pet. at 10-11. There is no conflict of the circuits on these issues, and requiring exhaustion in a

Montana exceptions case and applying the second *Montana* exception to fee lands within a reservation are fully consistent with this Court's precedents, including *Iowa Mutual* and *National Farmers Union*. (U.S. *Middlemist* Br. at 10-12).

b. Moreover, it would be premature for the Court to consider in this case whether "in the face of Congressional abrogation of tribal sovereign power," the Tribe may regulate the activities at issue here on the fee lands involved. The question assumes abrogation of the Tribe's powers over the lands involved, an issue which the Eighth Circuit did not decide, since it held (1) that that decision would turn on the specific facts of the case to be developed in the future, and the district court had erred in finding the tribal ordinance to be impermissible as a matter of law, Pet. App. 8a-9a, and (2) that tribal remedies must be exhausted as to this issue, Pet. App. 13a. The Oil Companies may make this argument to the tribal court, whose decision may then be reviewed by the federal district and circuit courts, after which the Oil Companies may petition this Court for writ of certiorari. To the extent the Oil Companies argue that the Tribe cannot rely on the second *Montana* exception as a matter of law, that issue may not even need to be decided in this case since the Tribe may not meet the "heavy burden [of] justifying these tax and employment statutes under the *Montana* exceptions," Pet. App. 13a, and judgment could ultimately be rendered for the Oil Companies on those grounds.

Respectfully submitted,

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